75-1611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Petitioner,

–against–

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

ROSHAN L. MEHRA, as Administrator of
the Goods, Chattels and Credits which
were of RAJINDER K. MEHRA, Deceased
Petitioner.

–against–

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROSHAN L. MEHRA, as Administrator of the goods, chattels and credits which were of RAJINDER K. MEHRA, deceased, petitions for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on December 30, 1975, and the Order of said Court, denying the Petition for Rehearing, entered on February 5, 1976.

Opinions Below

The Opinion of the United States Court of Appeals, as amended, is unreported (Appendix A).

The Amendment of the Court of Appeals' Opinion is appended separately (Appendix B).

The Opinion of the District Court is reported at 391 F.

Supp. 648 (E.D.N.Y., 1975) (Appendix C).

The Judgment of the Court of Appeals (Appendix A) was entered on December 30, 1975, and the Amended Opinion was entered on February 5, 1976. (Appendix B).

Jurisdiction is conferred upon this Court to review the Judgment of the Court of Appeals by Writ of Certiorari by United States Code, Title 28 § 1254 (1).

QUESTIONS PRESENTED

1. Does the power to set aside a jury verdict on the ground that "the circumstantial evidence presented lends itself equally to several conflicting inferences" violate the Seventh Amendment?

2. In a diversity case, is there a federal standard to govern the "sufficiency of the evidence"?

3. Is the doctrine of the law of the case a "discretionary rule of practice"?

STATEMENT

Our concern is the second trial of a wrongful death case involving a New York decedent and Pennsylvania defendants.

The decedent, Rajinder K. Mehra, a pedestrian, allegedly inebriated, was struck and fatally injured by defendants, the owner and operator of an automobile, on a divided four-lane highway in Allentown, Pennsylvania.

In the first trial, U.S. District Judge Orrin J. Judd found that the evidence raised questions of fact and submitted the case to the jury. The jury returned a verdict for the defendants.

After the verdict, District Judge Judd granted a new trial to plaintiff on the ground that the Court had erred in admitting evidence concerning insurance on decedent's life. Judge Judd did not only rule that there were questions of fact for a jury to decide. He also perceived a miscarriage of

justice if he allowed a verdict for defendants to stand. Accordingly, he granted plaintiff's motion for a new trial.

In the second trial before U.S. District Judge Thomas C. Platt, the plaintiff produced the identical witnesses as he did on the first trial. Defendants' version of the accident also remained constant. The same examination before trial of the defendant driver that was read by plaintiff's counsel at the first trial was read again at the second trial.

This time, however, the Court having heard the identical case, reserved decision on the defendants' motion to dismiss at the end of plaintiff's case and at the end of the entire case. After the jury returned a verdict for the plaintiff, Judge Platt granted defendants' motion for judgment notwithstanding the verdict.

Thus, there existed the bizarre result of one judge finding there were factual issues requiring jury determination (even finding that a verdict for defendants should be set aside); and a second judge finding that there were no factual issues requiring jury determination. Plaintiff appealed to the Court of Appeals from the granting of judgment n.o.v. by U.S. District Judge Platt.

The Court of Appeals affirmed, holding that:

1. where the circumstantial evidence presented lends itself equally to several conflicting inferences, the trier of fact is not permitted to select the inference it prefers. and

2. the forum's law governs the question of sufficiency of the evidence, which in this case, the Court proclaimed, precluded the jury from determining whether defendants were negligent, and

3. the doctrine of law of the case is a discretionary rule of practice.

In an Amended Opinion, the Court of Appeals, without a basis therefore, stated that "the parties assumed" that the question of the sufficiency of the evidence was to be decided by state law rather than federal law.

REASONS FOR GRANTING THE WRIT

POINT I

THE OPINION OF THE COURT OF APPEALS VIOLATES THE SEVENTH AMENDMENT

The Court of Appeals Opinion, holding that "If the circumstantial evidence presented lends itself equally to several conflicting inferences, the trier of fact is not permitted to select the inference it prefers . . ." conflicts with the Seventh Amendment.

The Opinion of U.S. District Judge Platt relied heavily on the case of *Martin v. Marateck*, 345 Pa. 103 (1942) which also gave the Court the right to take the case away from the jury under the equal inference rule.

Martin v. Marateck (supra) was specifically "disapproved" in *Smith v. Bell Telephone Co.*, 397 Pa. 134, 153 A2 477 (1959), which held:

". . .Also, it is beyond the power of the court to say whether two or more reasonable inferences are 'equal'. . .The right of a litigant to have the jury pass upon the facts is not to be foreclosed just because the judge believes that a reasonable man might properly find either way. A substantial part of the right to trial by jury is taken away when judges withdraw close cases from the jury. . ."

In the case of *Tenant v. Peoria & Pekin Union R.R.*, 321 U.S. 29, 35 (1944), the Court held:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which the fact–finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . ."

The Opinion below, by crediting the "equal inference" rule, challenges the "very essence of [the jury's function, which] is to select from among conflicting inferences and conclusions that which it considers most reasonable."

The Opinion below uses abstractions to justify the granting of judgment n.o.v., rather than making "the focal point of judicial review the reasonableness of the. . .conclu– drawn by the jury."

POINT II

WHETHER THERE IS A FEDERAL STANDARD TO GOVERN THE "SUFFICIENCY OF THE EVIDENCE" HAS BEEN ASKED BY THIS COURT, BUT NEVER ANSWERED

This Court granted certiorari in *Mercier v. Theriot*, 377 U.S. 152, 156, 84 S. Ct. 1157, 12 L. Ed.2d 935, 941, specifically for the purpose of resolving the alleged conflict among the circuits on whether to apply a federal or a state test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is raised on diversity of citizenship. This Court, however, did not resolve the question.

In *Dick v. N.Y. Life Insurance Co.*, 359 U.S. 437, 444–445, 79 S. Ct., 921, 926, 3 L. Ed. 2 935, 941, this "important question" was also raised. Again, however, it was not answered by this Court.

The Amended Opinion defensively suggests that the reason this question of whether to apply a state or federal test of "sufficiency of the evidence" was not raised in the original Opinion is because the question was not raised until the petition for a rehearing. The Court errs in this respect, because appellant's initial brief to the Court of Appeals argued in favor of a federal standard, abstracting from *Tenant v. Peoria & Pekin R.R.*, (supra), *Lavender v. Kurn*, 327 U.S. 645 (1946), *Dick v. New York Life Ins. Co.*, (supra) and *Harner v. John McShain, Inc. of Maryland*, 394 F. 2d 439 (4th Cir., 1968).

The record will also reflect that the case of *Reynolds v. Pegler*, 233 F. 2nd 429 (2nd Cir. 1955) was also advanced in support of a federal standard in appellant's Brief in Opposition to Defendant's Motion for Judgment n.o.v.

Apart from determining whether to apply state or federal law, Courts should be discouraged from predicating their decisions on "sufficiency of the evidence" when

1. the additional "abstract question" of whether to apply a state or federal test of "sufficiency of the evidence" is "difficult of solution." (5A Moore's *Federal Practice* § 50.06)
2. there is no recitation of the substantive law against which the sufficiency of evidence is to be applied. In this case, the Pennsylvania law of negligence was never recited.
3. a less conceptual and more factual acknowledgment of the facts would reveal that the driver of the car admitted that his range of vision on a clear, straight road was unobstructed when he struck the decedent with the left corner of the left front fender, shattering his windshield. This, of course, can not be reconciled with the Opinion's holding that there was "no indication of negligence."

POINT III

THE COURT OF APPEALS' OPINION RELEGATES LAW OF THE CASE TO A MEANINGLESS DOCTRINE

The first trial judge's finding that there was a question of fact for jury determination was law of the case. If the case of *Dictograph Products Co. v. Sonotone Corp.*, 230 F2 131 (2nd Cir., 1956) reh. denied, 231 F2 867 (1956) is to be interpreted the way the Opinion below does, then the doctrine of the law of the case becomes meaningless. To say that "the doctrine of the law of the case is a discretionary rule of practice" is to say that the doctrine of law of the case is to be applied when the second judge agrees with the first judge, and rejected when the second judge does not agree with the first judge. This is tantamount to examining each issue ab initio, which is the antithesis of law of the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted

FEDER, KASZOVITZ & WEBER

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Alvin M. Feder
Murray L. Skala
of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 330–September Term, 1975.

(Argued October 22, 1975 Decided December 30, 1975.)

Docket No. 75–7262

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Plaintiff–Appellant.

v.

ROBERTA BENTZ and RUDOLPH J. BENTZ,

Defendants–Appellees.

Before:

MOORE, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a decision of the Eastern District of New York, Thomas C. Platt, Jr., *Judge*, granting defendants–appellees' motion for judgment n.o.v., following a jury verdict for plaintiff–appellant in action for wrongful death.

Judgment affirmed.

ALVIN M. FEDER, Esq., New York, N.Y. (Feder, Kaszovitz, & Weber, Murray L. Skala, of counsel), *for Appellant.*

THOMAS R. NEWMAN, Esq., New York, N.Y. (Bower & Gardner, Benjamin H. Siff, Richard V. Caplan, of counsel), *for Appellees.*

MOORE, *Circuit Judge:*

Following a jury verdict for plaintiff–appellant in the amount of $10,000 for conscious pain and suffering and $69,500 for wrongful death (of which $2,500 represented funeral expenses), defendants Roberta and Rudolph Bentz timely moved the trial court altematively for judgment n.o.v. and a new trial pursuant to F.R.Civ. P. 50(b) and 59 respectively. This was the second trial in the case; the first trial ended in a jury verdict for defendants which was set aside, and a new trial ordered by Judge Orrin G. Judd of the Eastern District of New York, on the grounds that the admission at trial of evidence that the decedent was insured under a $100,000 life policy in which his parents were the named beneficiaries constituted prejudicial error.

I.

The automobile accident which is the subject of this action occurred on April 5, 1972, at about 11:15 P.M. Earlier in the evening defendants Rudolph and Roberta Bentz (Mrs. Bentz was then Rudolph's fiancee, Roberta Liscza) had dined at the home of one of Rudolph's professors at Allentown College of St. Francis; Rudolph had two drinks sometime before 7:30 P.M. and then consumed a beer with dinner, after which he had no other alcoholic beverages, only coffee.

On their way home, about 10:45 P.M., the Bentz's traveled over Route 309, an unlighted four–lane highway with a center divider and a low guard–rail on the outside of

the shoulder, limiting pedestrians' access to the road. The surrounding area was countryside. The posted speed limit for Route 309 was 60 miles per hour. Rudolph Bentz was driving his then fiancee's Volkswagen. His high beams were on and there were no other cars visible on the road. Bentz was approaching the apex of a hill which had a 15°–20° incline, when he suddenly saw a dark image in his windshield and heard a thud, after which his left windshield shattered. The car was not halted by the impact. Bentz remained in control of the vehicle, and brought it to a slow stop. He and his then–fiancee got out of the car, discussed what could have caused the impact, and flagged down a passing car. Two of the men in the second car went back up the hill to inspect the site and then reported to the Bentz's that they believed their car had run over a person who was now lying on the road. The decedent was pronounced dead at 12:10 by the local coroner; there is no evidence that he was conscious at any time after the accident. The coroner's analysis of decedent's blood revealed an alcohol content of .39%, which is indicative of severe intoxication and severe impairment of the motor and brain functions.

Although there was some question as to whether there was a dirt mark on the defendent's left front bumper, the most prominent and undisputed damage to the car was: a large dent on the car's left front fender, to the left of the front headlight; the broken windshield; and a broken antenna which was located on the same side. In other words, all of the damage was concentrated on the driver's side of the vehicle, in the vicinity of the left front wheel.

At the trial, the Bentzes testified that their car was traveling at 55 miles per hour, and that they had no advance warning of the decedent's presence on the highway. There were no eyewitnesses to the accident.

II.

Federal jurisdiction exists by virtue of the diverse citizenship of the parties (the decedent, New York; the defendants, Pennsylvania) and the sufficiency of the amount in controversy, 28 U.S.C. § 1332. Since this Court is sitting in diversity jurisdiction, it is incumbent upon us to apply the substantive law of New York to this action. *Erie Ry. Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). For purposes of *Erie* we treat as substantive the New York rules governing conflict of laws. *Klaxon Co.* v. *Stenton Mfg. Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Under New York law, while the law of Pennsylvania as the *lex loci* [1] would control the plaintiff–appellant's substantive right to recovery, the forum would apply its own law to matters of procedure, including weight and sufficiency of the evidence. In the case at bar appellant has challenged Judge Platt's finding[2] that there was no indication of neg–

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1 New York has adopted the "center of gravity" or "grouping of contracts" doctrine in determining which body of substantive law should apply to a tort action with multi-state contacts. *Babcock* v. *Jackson*, 12 NY 2d 473, 240 NYS 2d 743 (1963); *Tooker* v. *Lopez*, 24 NY 2d 569 (1969); *Neumeier* v. *Kuehner*, 31 NY 2d 121, 335 NYS 2d 64 (1972). In the circumstances of this case, we assume that application of this test would lead to the selection of Pennsylvania law as governing the plaintiff's substantive right of recovery.

2 Appellant also challenges Judge Platt's finding that the decedent was guilty of contributory negligence as a matter of law. Although there was ample evidence to support such a finding, it is unnecessary for us to review it on appeal, in light of our conclusions *infra* at pp. 1376-1377, respecting appellees' negligence.

Appellant additionally claims that Judge Platt failed to acknowledge Judge Judd's ruling which ordered a new trial as the law of the case. We need only note that in this Circuit, as appellant conceded at oral argument, the doctrine of the law of the case is a discretionary rule of practice. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131, 135 (2d Cir. 1956), *reh. denied*, 231 F.2d 867 (1956).

ligence on appellees' parts. Since this is a question of sufficiency of evidence, New York law govems the question.[2A]

In his opinion below, Judge Platt held that the evidence adduced at trial was insufficient as a matter of law to charge appellees with negligence. New York law squarely supports his conclusion.

The rule in New York is that, while inferences of negligence may be drawn from circumstantial evidence, those inferences must be the only ones which *reasonably could be drawn* from the evidence presented. If the circumstantial evidence presented lends itself equally to several conflicting inferences, the trier of the fact is not permitted to select the inference it prefers, since to do so would be the equivalent of engaging in pure speculation about the facts

> [A] possibility of causation will not suffice to impress liability upon a defendant. Conjecture is not enough. A cause of action must be something more than a guess. *Kalinowski v. Ryerson,* 242 A.D. 43, 45, (4th Dept. 1934), *aff'd* 270 N.Y. 532 (1936) (quotation marks and citations omitted.)

Accord, Schwartz v. Macrose Lumber & Trim Co., Inc., 29 A.D. 2d 781, 287 NYS 2d 706 (2d Dept., 1969), *aff'd,*

2A "We assume, as did the parties until the filing by appellants of a petition for a rehearing, that this question is to be decided by state rather than federal law. It is unnecessary for us to decide the issue, however, since we believe that application of federal law would lead to the same result. The question thus remains an open one in this circuit. See Calvert v. Katv Taxi, Inc., 413 F. 2d 841, 846 (2d Cir. 1969); Evans v. S.J. Groves & Sons Co., 315 F. 2d 335, 342 n.2 (2d Cir. 1963). See also 5A Moore, Federal Practice ¶ 50.06. Much the same applies to appellant's contention that Pennsylvania law should be applied. Judge Platt, applying Pennsylvania law, reached the same conclusion that we reach applying the law of New York."

24 N.Y. 2d 856, 301 NYS 2d 01 (1969); *Bearss v. Westbury Hotel Inc.,* 33 A.D. 2d 47, 304 N.Y.S. 2d 894 (1st Dept. 1969). The same principle has been specifically extended to actions for wrongful death.[3]

In *Wank v. Ambrosino,* 307 N.Y. 321, 125 NYS 2d 540 (1954), the Court of Appeals was presented with a situation factually similar to the case at bar. The defendant's car struck and ran over plaintiff's intestate, fatally injuring him, although at the time of impact the defendant was unaware that he had hit a pedestrian. As in the present case, no one knew how the decedent came to be struck by the vehicle. Because we believe the case to be a statement by New York's highest court of the law applicable here, we quote from the Court's decision at length.

> [T]he driver felt a bump, looked at the tires to see if one of them had gone flat, then started the car up again but, hearing more noise, again stopped the automobile and saw that underneath it, was the body of plaintiff's intestate....The man died soon afterward. Night had fallen at the time, there were no streetlamps nearby. The driver heard no outcry and had not seen plaintiff's intestate before. No one knew how he had gotten underneath the car....
>
> An inference could be justified that defendants' car hit the man, but, since there is nothing at all to show how that came about, there is nothing on which to

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3 The Appellate Division stated in *Boyce Motor Lines v. State of New York,* 280 A.D. 696, 117 NYS 2d 289 (3rd Dept. 1952), *aff'd* 306 NY 801, 118 NE 2d 819 (1954):

> "Circumstantial evidence, of course, may support a verdict. The rule, however, is that the inferences of negligence and proximate cause must be the only ones that can fairly and reasonably be deduced from the facts.... The mere happening of the accident, even in a death case, created no presumption of liability against the State."
> 280 A.D. at 696.

base a finding of negligent causation. True it is that "in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence". *(Noseworthy v. City of New York,* 298 NY 76, 80) but before that rule comes into play, there must be some showing of negligence, however slight. *Noseworthy* and similar cases, describe a method of, or approach to, weighing evidence, but there must be a showing of facts from which negligence may be inferred. Here there was none. The statement of one witness that there were "drag marks" on the street was denied by another of plaintiff's witnesses who was equally positive that they were "tire marks". Only by a process of pure conjecture could such testimony be a basis for a verdict of negligence. 307 NY at 323–4.

We note that the plaintiff in *Wank* presented a case for recovery that was actually stronger than the one offered by appellant here. There was conflicting testimony in *Wank* by eyewitnesses, one of whom testified that there were "drag marks" leading to the defendant's car, which would have indicated that defendant's vehicle was traveling at excessive speed.[4] In this case there were no eyewitnesses at all, and no testimony whatsoever suggesting that the defendants were operating their car in a negligible manner. Indeed, appellant could show nothing more than the fact that the decedent had met his death on the highway, and that there was reason to believe that the fatal impact occurred with the defendant's car. This, as a matter of law, is insufficient to permit recovery. *Boyce Motor Lines v. State of New York, supra,* at n. 3.

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4 The Court in *Wank* also noted that:

"The driver had a defect in the vision of his left eye, but there is nothing to show that it interfered with his safe operation of an automobile." 307 NY at 323.

This, too, provided more of an initial basis for considering defendant's negligence than is present in the case before us.

The trial court in its opinion granted the n.o.v. motion relied upon, and quoted extensively from, two Pennsylvania cases. *Martin v. Marateck,* 345 Pa. 103, 27 A.2d 42 (1942) and *Auel v. White,* 389 Pa. 209, 132 A.2d 350 (1957). Appellant in his reply brief points to *Smith v. Bell Telephone Co. of Pennsylvania,* 397 Pa. 134, 153 A.2d 477 (1959) as having "disapproved" the law of Pennsylvania as previously stated in its cases, including *Martin, supra.* This disapproval, however, was directed only to those cases in which several competing and reasonable inferences were available to the jury; the court in *Smith* held, in substance, that the decision as to which inference was the more reasonable was for the jury. But the court noted that "[I]t is the duty of the plaintiff to produce substantial evidence, which, if believed, warrants the verdict he seeks." *Smith, supra,* 153 A.2d at 480. In short, where there were "inferences reasonably deducible therefrom [the proof]" the judge should not substitute his judgment as to which inference should be drawn. But this is quite a different situation from that which confronted the trial judge here, namely, that *no* inference supporting liability could be drawn from the proof.

Accordingly, the judgment of the District Court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 330–September Term, 1975.

(Argued October 22, 1975 Decided December 30, 1975.)

Docket No. 75–7262

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Plaintiff–Appellant.

v.

ROBERTA BENTZ and RUDOLPH J. BENTZ,

Defendants–Appellees.

Before:

MOORE, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a decision of the Eastern District of New York, Thomas C. Platt, Jr., *Judge*, granting defendants–appellees' motion for judgment n.o.v., following a jury verdict for plaintiff–appellant in action for wrongful death.

Judgment affirmed.

ALVIN M. FEDER, Esq., New York, N.Y. (Feder, Kaszovitz, & Weber, Murray L. Skala, of counsel), *for Appellant.*

THOMAS R. NEWMAN, Esq., New York, N.Y. (Bower & Gardner, Benjamin H. Siff, Richard V. Caplan, of counsel), *for Appellees.*

Upon the petition of plaintiff–appellant for rehearing, it is hereby ordered that:

1. The petition for rehearing is denied
2. The opinion is amended as follows:

(a) At slip op. 1374, four lines up from the bottom in the text, delete "*Jackson v. Coggan*, 330 F. Supp. 1060, 1072 (S.D.N.Y. 1971); *Presser Royalty Co. v. Chase Manhattan Bank*, 272 F.2d 838, 840 (2d Cir. 1959)."

(b) At slip op. 1375, at the end of the third line, insert a new footnote 2A. That footnote will read as follows:

> We assume, as did the parties until the filing by appellants of a petition for rehearing, that this question is to be decided by state rather than federal law. It is unnecessary for us to decide the issue, however, since we believe that application of federal law would lead to the same result. The question thus remains an open one in this circuit. See *Calvert v. Katy Taxi Inc.*, 413 F. 2d 841, 846 (2d Cir. 1969); *Evans v. S.J. Groves & Sons Co.*, 315 F. 2d 335, 342 n.2 (2d Cir. 1963). See also 5A Moore, Federal Practice ¶¶ 50.06. Much the same applies to appellant's contention that Pennsylvania law should be applied. Judge Platt, applying Pennsylvania law, reached the same conclusion that we reach applying the law of New York.

February 5, 1976

LEONARD P. MOORE

WILFRED FEINBERG

ELLSWORTH VAN GRAAFEILAND

APPENDIX C

OPINION OF PLATT, D.J., DATED April 3, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA, Deceased

Plaintiff

–against–

ROBERTA BENTZ & RUDOLPH J. BENTZ, JR.,

Defendants

72 C 787
OPINION
April 3, 1975

PLATT, J.

Defendants move pursuant to Rule 50(b) and (c) of the Federal Rules of Civil Procedures for a judgment notwithstanding a jury verdict in favor of the plaintiff in the amount of $10,000 on plaintiff's first claim and $69,500 on plaintiff's second claim on the grounds that: (i) there was no evidence of negligence on the part of the defendants, and (ii) plaintiff's intestate was guilty of contributory negligence as a matter of law.

At the close of the evidence offered by the plaintiff and at the close of all of the evidence defendants moved to dismiss on the foregoing grounds and the Court in each case reserved decision.

In the alternative, defendants move pursuant to Rule 59 of Federal Rules of Civil Procedure for a new trial on the following grounds.

(i) The verdict was contrary to the weight of the credible evidence.

(ii) The charge of the Court with respect to a burden of proof on behalf of the plaintiff was erroneous under applicable Pennsylvania law.

(iii) The charge of the Court with respect to the burden of proof necessary on behalf of the defendant on the issue of contributory negligence was in variance with Pennsylvania law.

(iv) The verdict as rendered was so grossly excessive as to indicate a lack of proper deliberation on behalf of the jury and as such mandates the granting of a new trial.

(v) The weight of the evidence in the findings of the jury are so incompatible as to mandate a new trial.

Plaintiff's complaint was divided into two claims, the first for conscious pain and suffering (for which the jury awarded $10,000) and the second for support payments for his parents (for which the jury awarded $67,000) and funeral expenses (for which the jury awarded $2,500).

This is the second trial of this case; the first having occurred before U.S. District Judge Orrin G. Judd and a jury in November, 1973, at the conclusion of which the jury returned a verdict for the defendants.

During the course of the first trial, evidence was inadvertently admitted which indicated that plaintiff's intestate's life was insured under a life insurance policy for $100,000.; the beneficiaries of which were the plaintiff and his spouse (the deceased's parents). Even though Judge Judd instructed the jury during the course of trial and in his

charge that they should disregard this evidence, he apparently felt that such admission was so prejudicial to the plaintiff as to require him to set aside the verdict for the defendants and order a new trial. Accordingly, the case came on for trial before this Court in February, 1975, and, as indicated, the second jury reached a diametrically opposed verdict.

On the instant motions the Court is required, of course, to view the evidence in the light most favorable to the plaintiff. *Lebrecht v. Bethlehem Steel Corp.*, (2d Cir. 1968) 402 F.2d 585; *Wenhold v. O'Dea*, 338 Pa. 33, 35.

In this light, the facts are that Rajinder K. Mehra, age 32 years, was struck and fatally injured on April 5, 1972 at approximately 11:15 PM by an automobile driven by Rudolph Bentz, Jr. and owned by then Roberta Lintz (now Bentz) who was then the six year fiancee of (and is now the wife of) Rudoplh J. Bentz, Jr.

The automobile, a small Volkswagen, was traveling north on Route 309, a four–lane, divided, limited access highway in Salisbury, Pennsylvania, and at a point approximately 500 feet north of an access known as Cedarcrest Boulevard the accident occurred. As indicated, Route 309 consists of two lanes north and two lanes south and is separated by a center divider. There were no other cars on any of the four lanes; there were no eyewitnesses and there were no lights except for the headlights on defendants' Volkswagen which were lit.

The defendant Rudolph J. Bentz, Jr. testified (and his testimony was corroborated by his wife and in part by his former professor) that he and his fiancee had had dinner at the home of his former Professor Rabot; that he had had two cocktails during the hour or so before a 7 PM dinner, a glass of beer with dinner, and coffee after dinner; that his fiancee and he had started for their homes at approximately 10:45 PM in her Volkswagen which he was driving; that they had turned on to Route 309 and were proceeding northbound in the right–hand lane at a speed of approximately 55 miles

per hour; that the speed limit on such highway was 60 miles per hour; and that he was looking and observing the roadway in front of him as lit up by the VW's headlights. There was no other traffic either in front or behind them or coming in the opposite direction; the weather was dry and there was no illumination on the roadway except that which came from the VW's headlights.

Defendant Rudolph Bentz, Jr. testified further (and there was no evidence to contradict the same) that a split second prior to the impact he observed a glimpse or image of something to his left and in the next instance the impact occurred causing damage to the left side of his VW's left front fender and shattering the left side of his windshield in upon him. He said that he had no opportunity to apply his brakes or slow his speed from the time he first caught a glimpse of an image until the time of impact. He testified further that he brought his car under control and brought it to a stop at a point which later proved to be approximately 400 feet from where the plaintiff's intestate was found. One of the pictures of the VW taken after the accident shows a shadow or mark which was variously described as a "dirt mark" or "smudge" on the left side of the front bumper but other pictures introduced into evidence do not reveal any such mark. When questioned, both defendants indicated that such mark might have been made by one or the other of them shortly after the accident when they were sitting on the front of the Volkswagen discussing what possibly could have happened at a time before they were informed of the existence of plaintiff's intestate on the roadway. All of the pictures, however, definitely show (i) a dent on the left side of the Volkswagen's left front fender behind the headlight and (ii) a shattered left side of the windshield.

There was no evidence of any skid marks or of any attempt by the defendant Rudolph Bentz to bring his Volkswagen to an immediate stop. Indeed, the evidence quite clearly shows that neither of the defendants was aware of what happened until several minutes after the accident when

the occupants of another car came up to them and advised them of the existence of plaintiff's intestate on the highway.

Within a half hour or so after the impact, the authorities had arrived and plaintiff's intestate was pronounced dead. His body was removed to the offices of the local coroner where a blood sample was taken which, when tested, revealed a gross weight of alcohol in his blood of thirty–nine one–hundredths (0.39) percent. The supervisor of the testing laboratory testified that .10% blood content alcohol was presumptive of intoxication and .40% was evidence of a comatose condition in the average person.

Plaintiff argues that there was sufficient evidence from which the jury could infer that the defendant Rudolph Bentz should have seen the plaintiff's intestate prior to the accident; that the Volkswagen was being operated at a speed in excess of the 60 mph speed limit; and/or that said defendant, having had some drinks and his fiancee in the car was driving at a speed or otherwise in a manner that his vehicle was not under control. There is nothing, however, in the record to support any such inference. The only testimony, (i.e., that of both of the defendants) is that the speed of the Volkswagen was 55 mph; that the vehicle was fully under control and that the defendant Rudolph Bentz was maintaining a normal lookout ahead. There is no evidence that he was in any way affected by the two cocktails that he had consumed several hours before the accident. All the testimony is to the contrary.

In *Martin v. Marateck*, 345 Pa. 103, A.2d (1942), the Pennsylvania Supreme Court reviewed the authorities in that State and under similar circumstances held that a verdict for the plaintiff could not be sustained. In the *Martin* case the decedent was struck by an automobile driven by the defendant on a public highway known as Route 11 at about 9:30 in the evening of June 8, 1940 at a point immediately east of the Village of New Kingston, Cumberland County. Route 11 is a main highway running between Carlisle and Harrisburg in an East/West direction and at the time of the

collision the defendant was driving in a westerly direction. The decedent was first seen passing between gasoline pumps and a filling station building by a motorist driving up to purchase gasoline. The witness next saw the decedent near the middle of the highway just as the defendant's car was then "just upon him" and "just ready to hit". An inspection of the motor vehicle after the accident revealed that "it was damaged on the right side; the right cowl light and the right front door window was cracked". In holding that there was no evidence of negligence on the part of the defendant the Pennsylvania Supreme Court made the following pertinent comments (345 Pa. at pp. 106–108):

> "Viewing this evidence in the light most favorable to appellant, as we are required to do in passing upon the propriety of the nonsuit (Wenhold v. O'Dea, 338 Pa. 33, 35), we are nevertheless bound to conclude, as did the court below, that it was clearly insufficient to take the case to the jury on the issue of appellee's negligence. The mere fact that the deceased was struck by the automobile of appellee on a public highway, which is all that is disclosed with any degree of certainty, affords no proof that the appellee was at fault. In addition to establishing the fact of accident, it was incumbent upon appellant so to describe, picture or visualize what actually happened at the time of the accident as to enable one fixed with the responsibility for ascertaining the facts to find that the appellee was negligent and that his negligence was the proximate cause of the accident. See Fischer v. Amsterdam, 290 Pa. 1, 3; Lithgow v. Lithgow, 334 Pa. 262, 264; Skrutski v. Cochran, 341 Pa. 289, 291. This appellant's evidence obviously fails to do so. The record is devoid of any evidence showing how Martin came onto the highway or what length of time he was on the highway before he was struck, and his actions and movements from the time he left the gas pumps until the moment of impact are left wholly unexplained so that it is impossible to infer from the evidence presented that appellee saw or should have seen him on the highway a sufficient time before the

accident to bring the automobile to a stop, if under proper control. Under such circumstances, and in the absence of any evidence that appellee was driving in an improper manner or at excessive speed, that his attention was distracted, or that his car was mechanically defective, a verdict in favor of appellant would not necessarily be based upon pure speculation and conjecture, rather than upon any proof of negligence, and could not be sustained; McAvoy v. Kromer, 277 Pa. 196; Hadhazi v. Zero Ice Corporation, 327 Pa. 558; Pfendler v. Speer, 323 Pa. 443; Brooks v. Morgan, 331 Pa. 235; Wenhold v. O'Dea, supra; Skrutski v. Cochran, supra.

"McAvoy v. Kromer, supra, is a case closely in point here. There a child, seven years of age, was struck by an automobile, between crossings, on a city street. He was seen just as he left the curb to cross the street and was next seen either being struck or under the front part of the vehicle; no one saw him in the intervening space from the curb to the place of accident. On this state of the proofs, this Court held there could be no recovery for the injuries to the child, stating as follows (pp. 197–98): ' . . . to affirm appellee's case, we must hold that a mere collision between an automobile and a pedestrian or vehicle proves negligence; this it does not do . . . Was he run down by the car, the driver of which could have seen him a sufficient length of time to have guarded against it? The accident occurring between crossings, did he suddenly run in front of the car; was he crossing the street heedlessly; was he crossing the street without regard to traffic . . . ; did he reach the south side of the street safely and suddenly dart back in front of the car, or did the car suddenly swerve, striking him? All these circumstances are left to conjecture; defendants might have been responsible for one or more of the causes and not so as to others. In such cases, where it is equally probable the accident may have resulted from either cause, there can be no recovery: Alexander v. Pennsylvania Water Co., 201 Pa. 252.' Another case substantially identical to the one in hand is Hadhari v. Zero Ice Corporation, also supra. In that case deceased was

seen before he was struck, about the middle of a thirty–feet wide street, not at an intersection, but the evidence did not disclose where he came from or what were his movements immediately before the automobile reached him. Witnesses testified they heard the brakes of the automobile screech and saw deceased in front of it, just how far away they could not say. As in the present case, no evidence was offered that the automobile was being driven in a careless manner, and no question of excessive speed or mechanical defect of the car was involved. In sustaining a compulsory nonsuit, this Court said (p. 559): 'We, therefore, have a situation where the only basis for the conclusion that the automobile was negligently operated must be the fact that deceased was in the street, and that the brakes screeched, indicating that the driver of the car was endeavoring to stop it. This was not sufficient. "The mere fact that a decedent, a pedestrian, was struck by a vehicle on a public highway was not sufficient to support a finding of negligence": Sajatovich v. Traction Bus Co., 314 Pa. 569, 572.' Applying these decisions to the present case, the conclusion in inescapable that under appellants evidence there was no question of negligence on the part of the appellee to be presented to the jury, and hence the motion to take off the compulsory nonsuit was properly refused."

Similarly, in the case at bar, since the record is devoid of any evidence showing how plaintiff's intestate came on to the highway or what length of time he was on the highway before he was struck and his movements on the highway until the moment of impact are left wholly unexplained, "it is impossible to infer from the evidence presented that [defendant] saw or should have seen him on the highway a sufficient time before the accident to bring the automobile to a stop * * *. Under such circumstances and in the absence of any evidence that [said defendant] was driving in an improper manner or at an excessive rate of speed, that his attention was distracted, or that his car was mechanically defective, a verdict in favor of (plaintiff) would necessarily be based upon pure speculations and conjecture, rather

than upon any proof of negligence, and could not be sustained."

The plaintiff argues, nonetheless, that the jury could have and did disbelieve the defendant driver's claim that he was observing the roadway ahead.

However, even if the jury could have found "from the evidence that the defendant driver was at fault in failing to observe the plaintiff's intestate, the same evidence renders more manifest decedent's default in failing to see the defendant's approaching vehicle." *Auel v. White*, 389 Pa. 209, 132 A.2d 350 (1957).

In the *Auel* case, supra, the facts were strikingly similar to those in the case at bar. There at about 9 PM the plaintiff, about 60 years of age, was walking across a four lane 45 foot in width thoroughfare in Allegheny County. After the plaintiff traversed the roadway on the south side of the street and crossed the center line thereof he was struck by the defendant's car at a point between the left front bumper and fender and by reason of the injuries inflicted was rendered mentally incompetent. The defendant "stated that 'I didn't see that man until I hit him'."

Moreover, in that case since the plaintiff was incompetent the Court accorded him the same presumption as would have been accorded a decedent and nonetheless held that he was guilty of contributory negligence as a matter law. If anything, the case at bar presents an *a fortiori* situation in that the plaintiff here was clearly shown to have been heavily intoxicated and to have been a pedestrian on a limited access highway in the middle of the night where he had no right to be.

In holding the plaintiff guilty of contributory negligence as a matter of law the Pennsylvania Supreme Court said in *Auel*, (389 Pa. at pp. 213–214):

"However, even if the jury could find from the evidence that the defendant was at fault in failing to observe the plaintiff

the same evidence renders more manifest plaintiff's default in failing to see the defendant's approaching vehicle. It is well established that where a pedestrian traverses a street at other than a regular crossing he is bound to exercise a higher degree of care for his own safety than would be the case were he crossing at an intersection: Harris v. DeFelice, 379 Pa. 469, 475, 109 A.2d 174; Rucheski v. Wisswesser et al., 355 Pa. 400, 50 A.2d 291. The reason for the rule is apparent for he is crossing at a place where vehicular traffic could not be expected to anticipate a pedestrian; Schweitzer et al. v. Seranton Bus Company, 344 Pa. 249, 25 A.2d 156. It is equally well settled that it is the duty of a pedestrian to look before he undertakes a street crossing and to continue to look as he proceeds and such duty is particularly incumbent upon one who traverses a street between intersections: Aaron v. Strausser, 360 Pa. 82, 59 A.2d 910. Since the plaintiff herein was unable, due to his failure of memory, to give his version of the accident, the same presumption of due care which arises upon the death of a party was applicable. Where a plaintiff's mind is a blank as to an accident and all its incidents, the presumption is that he did all that the law required him to do and was not guilty of contributory negligence: Heaps et al v. Southern Pennsylvania Traction Co., 276 Pa. 551, 553, 120 A. 548; Grgona v. Rushton, 174 Pa. Superior Ct. 417, 101 A.2d 768. The presumption, however, is a rebuttable one and must give way when the facts as established by plaintiff's evidence show that he was guilty of contributory negligence: Hogg, Admr. v. Bessemer & Lake Erie Railroad Company, 373 Pa. 632, 638, 96 A.2d 879; Rank v. Metropolitan Edison Company, 370 Pa. 107, 115, 87 A.2d 198. * * *

* * *

"* * * There was nothing to show that plaintiff's view was in any way obscured, and, therefore, he was bound to see that which must have been plainly visible at the time it became his duty to look. The inference is unavoidable that if plaintiff had looked he could have averted the danger. No other reasonable conclusion can be drawn from the testimony presented in plain–

tiff's case. If he failed to look he was negligent and if he looked he must have seen defendant's moving vehicle and in stepping in front of it or into it was equally negligent. What was said in Dando v. Brobst, 318 Pa. 325, 327, 177 A. 831, is apposite here: ' . . . plaintiff must inevitably have seen the car if she had looked, and if she saw nothing she could not have been looking. As we have repeatedly pointed out, it is vain for a person to say he looked when, in spite of what his eyes must have told him, he moved into the path of an approaching car or train by which he was immediately struck.' See also Weldon, Admrs. v. Pittsburgh Railways Company et al., 352 Pa. 103, 105, 41 A.2d 856 * * *"

The rule in Pennsylvania was otherwise summarized by the Pennsylvania Supreme Court in *Dwyer v. Kellerman* as follows: (363 Pa. at pp. 595, 596):

" 'It is settled that a pedestrian crossing a street must not only look before he enters but must continue to look as he proceeds and that *he will not be heard to say that he looked without seeing what was approaching and plainly visible:* [citing cases] (Emphasis supplied). See also Rucheski v. Wisswesser, 355 Pa. 400, 401, 50 A.2d 291; and Pessolano v. Philadelphia Transportation Co., 349 Pa. 73, 75, 36 A.2d 497' * * * 'A pedestrian intending to traverse a street has a duty to maintain a diligent lookout for approaching cars. If he fails to do so, he is guilty of contributory negligence as a matter of law: Gajewski v. Lightner, 341 Pa. 514, 516, 19 A.2d 355, 356' ".

In addition to plaintiff's intestate's manifest failure to look, defendants claim further negligence on his part is shown by his mere presence on the limited access highway in violation of 36 P.S. § 2391.1 which provides that:

"For the purposes of this act, a limited access highway is defined as a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway * * *"

and by his highly intoxicated (if not comatose) condition (75 P.S. Sec. 624.1).

Defendants' position in short is that, if a person is found at 11:15 PM in an almost comatose condition in the middle of a limited access highway and is unable to avoid a collision with a small Volkswagen he must be guilty of contributory negligence as a matter of law.

As indicated above, the Pennsylvania authorities support this conclusion. *Auel v. White*, 389 Pa. 209, 132 A. 2d 350 (1957); *Martin v. Marateck*, 345 Pa. 103, (1942); *Dwyer v. Kellerman*, 363 Pa. 593 (1950).

Quite apart from the applicable law in Pennsylvania it is difficult to conceive of how plaintiff's intestate came into contact with defendants' Volkswagen without doing so intentionally or being so wantonly and grossly negligent and reckless in the premises as to produce such result. To put it mildly, it would have been a simple matter for anyone in even partial possession of his faculties to have avoided colliding with a Volkswagen travelling at 55 mph.

It is not inconceivable that a driver of an automobile on a limited access, high–speed highway with no illumination might not observe a person coming from an unknown and unspecified place on the left hand side of the vehicle, but it is utterly incredible that the plaintiff's intestate failed to see the headlights of the approaching Volkswagen which was the only vehicle on the entire highway. As the Supreme Court in Pennsylvania said in the case of *Sweigert v. Kazer*, 410 Pa. 71 at p. 77 (1963):

" 'His failure to observe appellee's motor vehicle not only is unexplained but inexplicable.' "

If the courts are to hold that a person may get himself (i) into a highly intoxicated condition (ii) into the middle of a limited access, high–speed highway in the middle of

the night and (iii) into contact with the only vehicle proceeding on such highway (travelling within the speed limit and with its headlights lit) and that under the circumstances a jury may determine that there was no contributory negligence, then the doctrine of contributory negligence becomes either a sham or an illusion.

For the foregoing reasons the Court feels that the verdict must be set aside and a judgment for the defendants must be entered notwithstanding the verdict under and pursuant to Rule 50(b) of the Federal Rules of Civil Procedure.

Pursuant to Rule 50(c) of such Rules, the Court must also rule on the defendants' motion for a new trial by determining whether it should be granted if the judgment for the defendants is hereafter vacated or reversed and must specify the grounds for granting or denying defendants' motion for a new trial.

As indicated above, the Court feels that the verdict as rendered was contrary to the weight of the credible evidence and, in addition, it also feels that the verdict was so grossly excessive as to indicate a lack of proper deliberation on the part of the jury.

Plaintiff's first claim was for alleged conscious pain and suffering of his son prior to his death and the jury returned a verdict of $10,000 on this claim. Plaintiff's theory on this claim was that the coroner's report indicated one of the causes of death to be– "bleeding to death"– and that from this entry the jury could infer that plaintiff's intestate suffered "conscious pain and suffering". Again, it defies credibility that a man with .39% blood alcohol content could (i) have been conscious after the indicated accident or (ii) have felt any pain during the very short period of time before he was pronounced dead on the arrival of the appropriate authorities. In addition, all of this presupposes that the decedent was not killed instantly and had some period of inebriated consciousness.

Again, the commonly used expression "he is feeling no pain" would have little or no menaing if this portion of

the verdict were to be upheld. Common sense dictates that there is just no basis for this portion of the jury's verdict and it is even questionable in the Court's mind whether an inference of "conscious" pain and suffering may properly be drawn from the foregoing entry in the coroner's report. There was no medical testimony to such effect.

With respect to the plaintiff's second claim, the parties stipulated during the course of the trial that the maximum amount of the allowable funeral expenses was $2,411.31 and left to the jury solely the question of the reasonableness thereof. Despite such stipulated maximum, the jury returned a verdict for $2500 for funeral expenses.

The award of $67,500 for wrongful death is also incredible in the light of the evidence. The plaintiff admitted that he had testified at the first trial that his son made contributions of $100 to $200 amonth for the use of various relatives of the decedent other than his mother and father. Answers to interrogatories served prior to the trial made no claim of support for Mr. and Mrs. Mehra. During the course of the second trial the plaintiff claimed apparently for the first time that some of the money (the $100 to $200 a month) had been used for his purposes and had not at all been passed on to other relatives.

While the decedent gave every indication of some potential in his career and there was unquestioned evidence that he was devoted to his family, the proof also showed that he had not been working from September of 1971 until shortly before his death in April, 1972 and that in his new job of about one month he was only making $15,000 a year. There was no proof that any of his first month's salary went to his parents. There was proof that his father, the plaintiff, was working and supporting his wife. Even if it were assumed that the decedent would have made some contributions (possibly as much as $100 to $200 a month) to his parents for the balance of their lives the verdict was far in excess of any such amounts discounted to today's value. There must be some rational basis to sustain this or any other verdict of a

jury. In this case, none exists. An outside maximum of approximately one–half of the jury's verdict might have been justifiable on the evidence, but beyond that the verdict represents "guesswork" and should not be sustained.

The Court is well aware of substantial verdicts being allowed to stand in such cases as *Hart v. Forchelli,* 445 F. 2d 1018 (2d Cir.), *cert. denied,* 404 U.S. 940 (1971), and *Campbell v. Westmoreland Farm, Inc.,* F.Supp. (E.D. N.Y., 1972, Judd, J.) 67–C–1, but does not believe that verdicts based on sheer speculation such as the one in the case at bar have any place in the true adminstration of justice.

For the foregoing reasons if this Court's judgment notwithstanding the verdict is vacated or reversed, a new trial should be had.

SO ORDERED.

Thomas C. Platt
U.S.D.J.

opposition

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1611

ROSHAN L. MEHRA, as Administrator of the Goods, Chattels and Credits which were of RAJINDER K. MEHRA,

Petitioner,

vs.

ROBERTA BENTZ and RUDOLPH J. BENTZ, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introductory

This is an ordinary negligence action in which plaintiff's petition for certiorari is bottomed on complaints that are without merit and were considered and properly rejected by the court below both on the appeal and the petition for rehearing.

The predicate for the petition ignores the time honored rule that the purpose of granting certiorari is

> "[t]o bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." (*Magnum Co.* v. *Coty,* 262 U.S. 159, 163)

There are no such questions in this case.

Statement

The relevant facts are set forth in the comprehensive opinions delivered by Judge Platt of the United States District Court, Eastern District of New York (Petitioner's Appendix pp. A11-A25) and by Judge Moore of the United States Court of Appeals for the Second Circuit (Petitioner's Appendix pp. A1-A8). Accordingly the facts will be dealt with briefly herein.

The accident.

There were no eyewitnesses to the accident. It occurred at about 11:15 p.m. in the northbound lane of Route 309 approximately 500 feet north of the Cedarcrest Boulevard exit in Salisbury, Pa. (Tr. 51, 58).* At that point the road is hilly, there is a 15 to 20 degree upgrade, and the accident took place near the apex of the hill, where the hill levels off (Tr. 59, 66; see photographs, Defts. Exs. C1, 2 and 3).

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* References in parentheses preceded by "Tr." are to the pages of the stenographic minutes of the trial on February 24, 1975. Those preceded by "Tr. 2/20" are to the trial minutes of February 20, 1975. References followed by the letter "a" are to pages of the "appendix for plaintiff-appellant" filed with the Court of Appeals.

The accident occurred on an unlighted, high-speed limited-access highway at a point where pedestrians had no right to be (36 Pa. Stat. §2391.1) and where the defendants had no reason to expect that a pedestrian would walk into their driving lane (see photographs, Defts. Ex. C-2 and C-4 and Pltf. Ex. 2C).

Rudolph Bentz testified (and, as Judge Platt noted, "there was no evidence to contradict the same", 96a), that

> "as we approached to top of this hill, I remember seeing, like there is a flash or something in front of me, and in a matter of a fraction of a second, there was a smashing sound against my car and my windshield was shattered and the glass was blowing in against me."

The "flash" or "image" or "glimpse of an object" that defendant saw "at almost the precise moment of impact" (Tr. 91), "the split second, the instant before the noise" he heard (Tr. 76), appeared in front of him and "to the left a bit" (Tr. 60). Mr. Bentz did not know what broke the window or what created the thud (Tr. 2/20, Tr. 9, 18).

He further testified that he had no opportunity either to apply his brakes or to slow down from the time he caught a glimpse of the image to his left until the impact "an infinitesimal amount of time", a "split second" later (Tr. 59-60, 87; Tr. 2/20, p. 30). There was no evidence of any skid marks and, as Judge Platt observed (97a) "the evidence quite clearly shows that neither of the defendants was aware of what happened until several minutes after the accident when the occupants of another car came up to them and advised them of the existence of plaintiff's intestate on the highway."

After the impact, defendant managed to keep the Volkswagen under control and bring it to a stop on the right shoulder of the road approximately 400 feet beyond the place where decedent was subsequently found (Tr. 59-60, 88).

Defendants got out of their car, looked around, saw damage to the left front fender, and for the first time "realized that the car had hit something" (Tr. 61). Rudolph Bentz testified (Tr. 61-2):

> "I looked over the roof to my fiancee and said something to the effect, are you okay, and she nodded and said, 'I'm all right,' and I moved to the front of the car and met her there and just looked at each other completely stunned. We had no idea what was going on at that time."

Defendants waved down a passing car and two of the men in it ran back up the hill and then returned and told defendants "something is laying on the road back up there" and "We think you hit a hitchhiker" or "something like that" (Tr. 2/20, pp. 10, 19; Tr. 62).

Shortly thereafter the police arrived (Tr. 62-3). Decedent was pronounced dead by the local coroner at 12:10 a.m. Cause of death was listed as "Accident, Exsanguination, Multiple Severe Lacerations & Compound Fractures" (Defts. Ex. A). There was no evidence that he was ever conscious after the accident.

A sample of decedent's blood alcohol level (tested by the local coroner as required by Pennsylvania law in the case of fatal accidents, Tr. 95) was found to contain 390 milligrams (0.39) percent of Ethynol (Defts. Exs. A and F; Tr. 104). Pennsylvania law considers a person to be under the influence of alcohol at 100 miligrams percent (Tr. 104). According to Dr. Shoemaker, the Chief of the Clinical Toxicology Laboratory of the Pennsylvania

Department of Health, a blood alcohol level of 0.39 indicates that the individual was "severely intoxicated" with "severe impairment" of motor and brain function (Tr. 105).

The photographic evidence.

Since plaintiff's entire case rests on the speculative and conjectural assumption that defendant Rudolph Bentz must, or at least should, have seen decedent before the impact and in sufficient time to avoid the accident, plaintiff suggests that the decedent was struck head-on, by the front of the Volkswagen (Brief for Applt. pp. 9-10).

The photographic evidence conclusively refutes this suggestion and demonstrates that the front of the car was not touched, that the impact was to the left side of the front fender.* See, particularly, Defendants' Exhibits B-1, 2, 3 and 4 which show that the headlight, front bumper and front of the fender are all unscathed while the left front side of the fender at a point behind the

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* Photographs have been described as "the perfect witness—an eyewitness who cannot forget and whose memory cannot be distorted" (Gardner, *The Camera Goes to Court*, 24 N. Car. L. Rev. 235).

Time and again it has been held that verdicts contrary to photographic evidence cannot stand (*Walker* v. *Murray*, 255 App. Div. 815, *aff'd.* 280 N. Y. 709; *Szczygial* v. *Isthmian SS Co.*, 285 App. Div. 877; Busch, *Photographic Evidence*, 4 DePaul L. Rev. 195. 200, citing *Hartley* v. *A. I. Rodd Lumber Co.*, 282 Mich. 652, 276 N. W. 712; *Mobile & O. R. Co.* v. *Bryant*, 159 Miss. 528, 132 So. 539; *Lessig* v. *Reading Transit & Light Co.*, 270 Pa. 299, 113 Atl. 381). Photographic evidence has its own independent probative value (Gardner, *The Camera Goes to Court*, 24 N. Car. L. Rev. 233; 3 *Wigmore on Evidence*, § 792a, 1955 Pocket Supp., p. 54).

headlight is dented. This plainly indicates that decedent must have walked into the side of the passing car, coming from the direction of the unilluminated center divider of the roadway. These photographs accurately reflect the condition of the car after the accident (Tr. 64, 130).

POINT I

There is no reason to grant the writ.

There has been no violation of petitioner's Seventh Amendment rights as no evidence was ever submitted to raise a triable issue as to defendants' alleged negligence

While the Seventh Amendment preserves a suitor's right to a jury trial, petitioner would so broaden the scope of that amendment as to obliterate the most time-honored and unchallenged, common law exception to the rule, *viz.* cases such as this where the evidence is insufficient to raise a triable issue of fact.

In *Manaia* v. *Potomac Electric Power Co.*, 268 F.2d 793 (4th Cir.), cert. den., 361 U.S. 913, also a wrongful death and personal injury action in which there was no issue of fact requiring the jury's determination, the Court of Appeals wrote:

> "Finally, it is said that granting these judgments n. o. v. was a denial of the plaintiffs' rights under the Seventh Amendment. * * * no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too

firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences.

* * * The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this. See the opinion of Mr. Justice Frankfurter in Dick v. New York Life Insurance Co., 359 U.S. 437; Smith v. Reinauer Oil Transport, Inc., 1 Cir., 256 F.2d 646.

> Affirmed." (268 F.2d 797-798).

In the instant case nowhere was a theory presented or proven by petitioner that would ascribe to the respondents the slightest amount of negligent behavior. A survey of the facts reveals that all the jury could have inferred from the evidence was a contact between defendants' automobile and the decedent that resulted in his death. Beyond that it would be patently incorrect to go. The inference of negligence on defendants' part did not even rise to the level of speculation or conjecture here but remained totally unsubstantiated and otherwise unproven.

Whether, as has been urged, negligence was spelled out on the basis of circumstantial evidence must be gauged by New York law. That law requires that when circum-

stantial evidence is relied on "the circumstances must be such as to lead fairly and reasonably to the conclusion sought to be established and to exclude any other hypothesis fairly and reasonably." (*Ruppert* v. *Brooklyn Heights R. Co.,* 154 N. Y. 90, 93.)

The inference contended for must be the only one which can be reasonably drawn from the facts (*Maislin Bros. Transp.* v. *State of New York,* 15 A. D. 2d 853, 854; *Boyce Motor Lines* v. *State of New York,* 280 App. Div. 693, 696, affd. 306 N. Y. 801; *Lyle* v. *State of New York,* 44 A. D. 2d 239).

In other words, if an accident can with equal reason be accounted for on any theory other than appellee's negligence, appellant's burden of proof has not been met and his action must fail (*Schwartz* v. *Macrose Lumber & Trim Co.,* 29 A. D. 2d 781, *aff'd* 24 N. Y. 2d 856; *Lane* v. *City of Buffalo,* 232 App. Div. 334; *Babcock* v. *Fitchburg R. Co.,* 140 N. Y. 308, 311; *White* v. *Lehigh Valley RR. Co.,* 220 N. Y. 131; *Digelormo* v. *Weil,* 260 N. Y. 192, 200).

"A possibility of causation will not suffice to impress liability upon a defendant. Conjecture is not enough" (*Kalinowski* v. *Joseph T. Reyerson & Son, Inc.,* 242 App. Div. 43, *aff'd* 270 N. Y. 532). "A cause of action must be something more than a guess." (*Digelormo* v. *Weil,* 260 N. Y. 192, 199.)

The narrated facts demonstrate the complete applicability of what the New York Court of Appeals stated in *Wank* v. *Ambrosino,* 307 N.Y. 321, 323-324, an automobile case factually similar to this one.

> "An inference could be justified that defendants' car hit the man, but since there is nothing at all to show how that came about, there is nothing on which to base a finding of negligent causation.

> True it is that 'in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence', *Noseworthy* v. *City of New York,* 298 N.Y. 76, 80, but before that rule comes into play there must be some showing of negligence, however slight. *Noseworthy,* and similar cases, describe a method of, or approach to, weighing evidence, but there must be a showing of facts from which negligence may be inferred. Here there was none. The statement by one witness that there were 'drag marks' on the street was denied by another of plaintiff's witnesses who was equally positive that they were 'tire marks'. Only by a process of pure conjecture could such testimony be a basis for a verdict of negligence."

Since there was no evidence which tended to establish negligence on the part of defendants, the "sufficiency of the evidence" is clearly not a question in this case

Petitioner asks this Court to decide whether a state or federal test should be used in determining the sufficiency of the evidence in diversity cases. That issue is not presented.

The issue here is whether *any* proof was offered by petitioner from which a jury could find negligence on the part of defendants. To suggest that the issue is sufficiency of evidence is, we submit, to credit petitioner's case with having arguable merit when in fact none can be extrapolated from the record.

The record in this case invokes application of what the Court of Appeals recently said in *Epoch Producing Corp.*

v. *Killiam Shows Inc., et al.,* 522 F. 2d 737, where it discussed the standards governing the determination of the propriety of a district court granting of a judgment n.o.v.:

> "The evidence must be 'such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict,' [citations omitted]
>
> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. * * * A mere scintilla of evidence is insufficient to present a question for the jury." (522 F.2d at 742-43).

The court's submission to the jury in the first trial of the questions of negligence and contributory negligence and its statement that a verdict in favor of the defendants was against the weight of evidence, was not binding on Judge Platt under the doctrine of the law of the case

The effect to be given to a prior ruling in a case was discussed by Mr. Justice Holmes in *Messinger* v. *Anderson,* 225 U.S. 436, 444. He there stated:

> "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power."

In *Dictograph Products Co.* v. *Sonotone Corp.,* 230 F.2d 131, 135, the court held that the doctrine of the law of the case was a discretionary rule of practice which did not limit the power of the second judge, that the doctrine did not make the first ruling immune from reconsideration by the second judge. The court wrote:

> "As we view it, the question is in substance the same as that which arises when an appellate court upon a second appeal is faced with an earlier decision of its own, especially if the earlier decision happens to be that of a different panel of judges. The second panel has unquestioned power—'jurisdiction'—to deviate from the first, but as a matter of practice it rarely does so; and there is more season to refrain than if two different actions are involved, when the only question is whether to follow a precedent. In any event on both occasions there is no imperative duty to follow the earlier ruling—only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs."

As was stated in *Peterson* v. *Hopson,* 306 Mass. 597, 603, 29 N.E.2d 140:

> "A judge should hesitate to undo his own work. . . . Still more should he hestiate to undo the work of another judge. . . . But until the final judgment or decree there is no lack of power, and occasionally the power may properly be exercised."

See also, 1B Moore's Federal Practice, p. 453.

CONCLUSION

There is no basis for granting the writ and the petition should be denied.

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Respectfully submitted,

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